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IN THE

Supreme Court of the United States

October, 1968 Term

No. [redacted] 107

MATTHEW IANNIELLO,

Defendant-Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

OPPOSITION TO CERTIORARI

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Statement

The People of the State of New York, respondent herein, respectfully oppose the petition for a writ of certiorari to the New York Court of Appeals on the ground that no substantial federal question is presented by the decision of that Court in the present matter.

The Facts

On February 2, 1965, defendant was indicted in four counts for the crime of CRIMINAL CONTEMPT [Penal Law §600 (6)] arising out of appearances on June 11 and June 18, 1964, before the Fourth January 1964 New York County Grand Jury. That grand jury had been extended beyond its regular term to continue its investigation of corruption in the State Liquor Authority and related corruption in the New York City Police Department.

At the outset of his initial appearance on June 11, Ianniello, the owner of two bars in the Times Square area, engaged in the following colloquy with the district attorney:

> "Q. Mr. Ianiello [*sic*], I want you to be aware of the fact that you have been called here solely in the role of a witness, and this grand jury is conducting an investigation to determine if there was in existence a conspiracy to bribe or give unlawful fees to public officials of the City of New York, to wit, the Police Department or to public officials connected with the New York State Liquor Authority. Do you understand what I'm saying? A. Yes, sir.
>
> "Q. Now, in your role as a witness this grand jury is ready to confer immunity upon you should you consider any answers that you might give to a question directed at you by this grand jury might tend to incriminate you. Do you understand that? A. Do you mean in any field of the investigation?
>
> "Q. If you think that any answer that you might give to a question directed to you by this grand jury might tend to incriminate you this grand jury is prepared to grant you immunity so that when you give that answer that answer cannot be used against you

in any criminal proceeding. Do you understand that? A. I understand that" (1103-4).*

Shortly thereafter the following colloquy occurred:

"Q. Just a minute. You know, as Mr. McKenna brought out, this grand jury has voted to confer immunity upon you. A. Yes, sir.

"Q. From prosecution for whatever crimes your testimony may disclose. Do you understand that? A. I understand.

"Q. And you do appreciate that you are expected to give truthful testimony. You understand that? A. Yes, sir.

"Q. You are legally obligated to do so. A. Yes, sir.

"Q. You understand that? A. Yes, sir.

"Q. Now, this grand jury wants your testimony as a witness. You understand that? A. Yes, sir.

"Q. And you are called here exclusively in the role of a witness. Do you understand that? A. Yes, sir" (410-11).

After some questioning, Ianniello requested to confer with his attorney outside the grand jury room because he thought a question just put to him was "improper" (1119-20). The prosecutor denied the request, stating:

"Mr. Ianniello, we are not going to consent to the practice of your excusing yourself to confer ostensibly with your attorney in order to find out what kind of an answer you should make. You are the one that is legally obligated to give testimony and not your attorney" (1119).

Questioning then resumed. The testimony after this last exchange constituted the basis of the fourth count of the indictment.

* References, unless otherwise noted, are to the typewritten grand jury minutes of June 11, 1964.

One week later, on June 18, 1964, Ianniello again appeared before the grand jury at which time he stated that he had consulted with his attorney (1213). His testimony on this date is the predicate of the first three counts of the indictment.

On March 18, 1965, petitioner demurred to the indictment filed against him the previous month. The demurrer was disallowed (GELLINOFF, J.). In October, 1965, petitioner moved to dismiss the indictment, and the motion was denied [(MARKS, J.); opinion in petitioner's brief, appendix A].

Subsequently, petitioner moved for reargument of his motion to dismiss, alleging, *inter alia,* that the testimony constituting the basis of the indictment was obtained in violation of his right to counsel and his privilege against self-incrimination. On June 22, 1966, the court (MARKS, J.) granted reargument and dismissed the indictment, basing his decision solely on petitioner's right-to-counsel contention (opinion in petitioner's brief, appendix B).

The Decision Below

The Court of Appeals, unanimously per BREITEL, J., wrote as follows concerning the presently asserted grounds for certiorari:

> "'This case also raises a novel question concerning the existence and scope of the grand jury witness' right to consult with counsel. It is, of course, a familiar proposition that the lawyer for a witness is not entitled to be present in the grand jury room (see, e.g.,

Anonymous v. *Baker*, 360 U.S. 287, 292; *In re Groban*, 352 U.S. 330, 333; *United States* v. *Scully*, 225 F.2d 113, 115-116, cert. den. 350 U.S. 897; *In re Black*, 47 F.2d 542, 543; cf. *People ex rel. McDonald* v. *Keeler*, 99 N.Y. 463, 484-485; *Matter of M. Anonymous* v. *Arkwright*, 5 A D 2d 790, 791, mot. for lv. to ap. den. 4 N Y 2d 676). This rule rests upon the statutory exclusion of all except certain authorized persons before the grand jury and the need to preserve the secrecy of grand jury proceedings (Code of Crim. Pro., §§255-259). There remains, however, the further question whether the witness should not be entitled to leave the grand jury room to consult with his lawyer (see *United States* v. *Leighton*, 265 F.Supp. 27, 38; *United States* v. *Kane*, 243 F.Supp. 746; *United States* v. *Grunewald*, 164 F.Supp. 640, all indicating that the procedure in the Southern District of New York is to exclude the lawyer but to permit the witness to leave the grand jury room and consult with him; this is also done in state grand jury proceedings [see, e.g., *People* v. *DeFeo*, 284 App. Div. 622, 627, rev'd on other grounds, 308 N.Y. 595]). Such conduct by the witness does not violate the statutory policy of secrecy, for it has always been understood that the witness is at all times free to discuss his testimony outside the grand jury room. Whether and to what extent the witness ought to have a right to consult with his lawyer depends upon an analysis of the proper role of counsel in these circumstances, and the need to avoid procedural strictures which would impair the effectiveness of grand jury investigation.

"Since a grand jury proceeding is properly an investigation rather than a prosecution directed against the witness, the witness has no right to be 'represented' by counsel, in the technical sense (see, e.g., *In re Groban*, 352 U.S. 330, 332-333, *supra*). However, in light of current recognition of the importance of

counsel in providing effective notice of rights, it is difficult to maintain that the witness is not entitled to the advice of his lawyer (cf. *Miranda* v. *Arizona*, 384 U.S. 436, 475; *Escobedo* v. *Illinois*, 378 U.S. 478, 486; *People* v. *Donovan*, 13 N Y 2d 148, 153). As a matter of fairness, government ought not to compel individuals to make binding decisions concerning their legal rights in the enforced absence of counsel (see *Matter of Conlon* v. *Murphy*, 24 A D 2d 737 [patrolman could not be dismissed, without notice or hearing, on the basis of his refusal to give further grand jury testimony, after he had asked for and been denied an opportunity to consult counsel]). Courts have a particular responsibility to prevent unfairness in grand jury proceedings, for the grand jury is an 'arm of the court' (see, e.g., *Matter of Spector* v. *Allen*, 281 N.Y. 251, 260; *People* v. *Pisanti*, 179 Misc. 308, 309).

"The legal rights which may be critically affected before the grand jury, and concerning which the witness should be entitled to consult with his lawyer, are several. First, the witness may be put in a position of determining whether to assert or waive his privilege against self-incrimination. When the witness is a 'target' of the investigation, his statements and any evidence derived from them ('fruits') cannot be used in a prosecution against him for a previous substantive offense unless he expressly waives the privilege (*People* v. *Steuding*, 6 N Y 2d 214). Even he, however, must make a legally significant choice in answering or claiming his privilege; unless he claims his privilege he does not receive transactional immunity under section 2447 of the Penal Law. The witness who is not a target of the inquiry faces an even more critical decision for, unless he claims his privilege and thereby invokes immunity, his statements can be used against him substantively. Faced with a confusing variety of

rules concerning the existence and scope of his privileges, a witness should not be required to make these choices unaided by his lawyer.

"A second legal right which may be affected before the grand jury is the witness' right to refuse to answer questions having no bearing on the subject of the investigation (see *Matter of Koota* v. *Colombo*, 17 N Y 2d 147, 150). To prevent unwarranted intrustion into the witness' privacy, he ought to be allowed to consult with his lawyer concerning the propriety of grand jury questioning. Finally, where a question may involve a testimonial privilege enjoyed by the witness or to which he may be subject—for example, between attorney and client, doctor and patient or husband and wife—the witness should be permitted to consult with counsel.

"Whenever a witness demands to see his lawyer for counselling concerning his legal rights (as opposed to mere strategic advice), he should be given an opportunity to do so. If his right is denied, however, he does not have license to commit perjury or contempt. Rather, he must persist in his refusal to answer, thus forcing the prosecutor to take the matter into open court for a ruling. By requiring the matter to be taken to the presiding justice, the proceeding is expedited and the danger of stalling tactics reduced. The judge can rule on questions of pertinency, after argument of counsel. He can determine whether a colorable claim of testimonial privilege is presented, and can inform the defendant of the extent of his immunity from prosecution for prior offenses. Where a witness persists in raising objections which are palpably not in good faith, the judge may compel him to desist from this course under the sanction of contempt proceedings.

"This procedure was not followed here. Instead, defendant undertook to answer the prosecutor's questions, albeit in an evasive manner. If the instant record left any room for the possibility that defendant in fact needed legal counsel or, in good faith, asked for aid of counsel in a proper matter (as opposed to strategic advice in answering questions), affirmance would be required in the interests of fairness. The record, however, makes it abundantly clear that the aid of counsel was not required, and that defendant with full awareness was seeking help only in answering questions he found embarrassing. Defendant's request for his lawyer's advice was limited to whether the question put to him was 'proper.' Yet, the pertinence, indeed the relevance, of the question was never really in issue: it dealt with an alleged conversation concerning police payoffs, and defendant had been told initially that the purpose of the grand jury investigation was to 'determine if there was in existence a conspiracy to bribe or give unlawful fees to public officials of the City of New York, to wit, the Police Department.' He never raised any doubt as to the scope of the inquiry.

"Defendant did not request advice concerning any testimonial privileges, or his privilege against self-incrimination, or the obtaining of transactional immunity. Indeed, he had been repeatedly told that the grand jury was interested in him only as a witness, and that it was prepared to confer immunity upon him.

"Finally, three of the contempt counts refer to testimony given after a week's recess, during which defendant had extended opportunity to consult with his lawyer and undoubtedly did so, and hence are free of taint. The appearance before the grand jury a week after the first meeting is critically important. By that time defendant had the fullest opportunity to consult with counsel. Actually, the only area in which he still

needed proper lawful advice was with respect to his status as a witness given transactional immunity. The grand jury was still insisting unequivocally that it was giving him immunity or was ready to do so, and there was no assertion by anyone or implication from anything that he had waived any rights to his privilege against self-incrimination or that he was not entitled to the fullest immunity allowed by the statute. His conduct on his second appearance before the grand jury therefore presents no difficulty in assessing it as contemptuous and is highly persuasive in confirming that his purpose in asking to speak with his lawyer on the first occasion was specious and without legal basis."

POINT

As a grand jury witness, petitioner had no right to counsel.

The *nisi prius* court held that the right to counsel under the Sixth Amendment of the United States Constitution and Article I, Section 6 of the New York State Constitution was violated here because of:

> "the refusal of the foreman of the grand jury and of the district attorney to allow the witness to speak to his counsel outside the grand jury room to ascertain his right" (Record on Appeal, p. 31).

Rejected by the New York Court of Appeals, this position is now urged on this Court. The position, we believe, is essentially unsound, and the present case does not properly present the issue.

Inimical to the very nature of grand jury proceedings is the right here asserted by petitioner. The grand jury's

operation is fundamentally distinct from the normal forum of lawyers, being closed and *ex parte* [Code Crim. Proc. §§258, 952-p; *People* v. *Glen,* 173 N.Y. 395 (1903); *United States* v. *Levine,* 362 U.S. 610 (1910)]. Because the grand jury operates *ex parte,* "not charged with the duty of deciding innocence or guilt," its proceedings:

> "have never been conducted with the assiduous regard for the preservation of procedural safeguards which normally attends the ultimate trial of the issues. Thus, in such proceedings, there is no right to counsel, no right of confrontation, no right to cross-examining or to introduce evidence in rebuttal" [*United States* v. *Scully,* 225 F.2d 113, 116 (2d Cir. 1955) (MEDINA, J.)].

To accord a grand jury witness free access to counsel would not only affront the historic function of the grand jury, but would contort the nature of the right to counsel guaranteed in the New York and United States Constitutions. An ordinary witness before an investigative panel who challenges the propriety of a question can expect no comfort from those provisions. The rights there accorded are rights of an accused, a status Ianniello never achieved, nor was destined for [*Massiah* v. *United States,* 377 U. S. 201 (1964); *White* v. *Maryland,* 373 U. S. 59 (1963); *Hamilton* v. *Alabama,* 368 U. S. 52 (1961); *People* v. *Donovan,* 13 N.Y.2d 148 (1963); *People* v. *Meyer,* 11 N.Y.2d 162 (1962); *People* v. *Noble,* 9 N.Y.2d 571 (1961); *People* v. *DiBiasi,* 7 N.Y.2d 544 (1960)]. Ianniello, a mere witness in the grand jury, had no right to counsel [*In re Groban,* 352 U. S. 330 (1957) (majority and dissenting opinions); see *Jones* v. *United States,* 342 F.2d 863, 880 (D. C. Cir. 1964); *In re Black,* 47 F.2d 542 (2d Cir. 1955) (A. HAND, J.);

Kane v. *United States,* 243 F.Supp. 746 (S. D. N. Y. 1965)]. Indeed, some courts have held that even the prospective defendant has no right to counsel at the grand jury stage of the proceedings [*United States* v. *Scully,* 225 F.2d 113 (2d Cir. 1955), cert. den. 350 U. S. 897 (1955); *Gilmore* v. *United States,* 129 F.2d 199 (10th Cir. 1942), cert. den. 317 U. S. 631 (1942)].

Furthermore, the Sixth Amendment rarely calls for the services of counsel before the commencement of a legal action by the filing of a charge, an event which, of course, had not occurred in the present case. The two exceptional cases in which the right to counsel materialized before the status of "accused" was fully achieved were clearly rationalized by this Court in a manner which would exclude the witness before the grand jury. In both *Escobedo* v. *Illinois,* 378 U. S. 478 (1964), and the *Wade-Gilbert-Stovall* trilogy, 388 U. S. 218, 268, 293 (1967), an attorney was provided to prevent sealing the fate of the potential defendant at the preliminary "investigative" stage. The Constitution commands the assistance of counsel only at the "critical stages" of a criminal action [*Hamilton* v. *Alabama,* 368 U. S. 52 (1961)]. The grand jury, having elected to treat Ianniello as a witness purely, eliciting his testimony cannot be fairly viewed as a stage in a criminal prosecution *of him,* much less a critical stage demanding protection by an attorney. For this reason, the reliance on *Miranda* v. *Arizona,* 384 U. S. 436 (1966), by the petitioner is wholly misplaced. Equally inapposite would be an attempted analogy with more recent holdings interpreting the scope of the Sixth Amendment's assurance of counsel to the accused.

Moreover, the operative context of the *Miranda* requirements, "custodial interrogation," is entirely absent in the present situation. The inherent compulsion of the station house "atmosphere" [*id.* at 457] is clearly not present in the grand jury "composed of 12 to 23 members selected from the general citizenry * * * [who] have no axes to grind and are not charged personally with the administration of the law" [*In re Groban,* 352 U. S. 330, 347 (1957) (BLACK, J., dissenting), cited by majority in *Miranda, supra* at 466, n. 36 and *Escobedo* v. *Illinois,* 378 U. S. 478, 487-8 (1964); see Enker and Elsen, "Counsel for the Suspect: *Massiah* v. *United States* and *Escobedo* v. *Illinois,*" 49 Minn. L.Rev. 47, 91 (1964)].

Any question this witness might have had on whether a particular question was "proper," should have been, and could easily have been posed to the grand jury foreman, an impartial citizen who is disassociated with the prosecution and has direct access to the court for a ruling on matters of this kind. The respondent's lawyer, regardless of his sagacity, could neither have advised (having no knowledge of the context) nor ruled (having no authority) upon the question. Neither the state nor federal guarantee of counsel accords that right in such meaningless and patently inappropriate circumstances. As this Court observed many decades ago, a grand jury witness must:

> "tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.
>
> "He is not entitled to urge objections of incompetency or irrelevance, such as a party might raise, for

this is no concern of his'' [*Blair* v. *United States*, 250 U. S. 273, 282 (1919)].

Finally, even assuming, incorrectly, that Ianniello was deprived of a right to counsel during his first grand jury appearance, that virus would infect only the testimony given at that session. That testimony is utilized only in the last count of the indictment. As to his second appearance, the testimony given at that time, forming the basis of the first three counts of the indictment, was clearly not obtained in violation of his right to counsel. Ianniello stated at the outset of that appearance that he had consulted with his attorney, and he made no request, as he did during the first session, to confer with his attorney outside the grand jury room. Hence, any infringement of petitioner's right to counsel affects only one of the four counts of the indictment.

In the light of these considerations, the opinion of the New York Court of Appeals went considerably further than the Constitution requires in assuring to a witness before a grand jury that any bona fide need for the assistance of counsel will be accommodated. Indeed, the decision below can be read as granting the full claim of the defendant to this Court, in a proper case. For the heart of the holding below is the finding that, upon the present record, Ianniello was merely employing a strategic device to obtain temporary respite from questioning. Thus, the Court wrote:

> ''Whenever a witness [before the grand jury] demands to see his lawyer for counselling concerning his

legal rights (as opposed to mere strategic advice), he should be given the opportunity to do so."

And again:

> "If the instant record left any room for the possibility that defendant in fact needed legal counsel or, in good faith, asked for aid of counsel in a proper matter (as opposed to strategic advice in answering questions), affirmance [of the reversal by the intermediate appellate court] would be required in the interests of fairness. The record, however, makes it abundantly clear that the aid of counsel was not required, and that defendant, with full awareness, was seeking help only in answering questions he found embarrassing."

While quoting this language in his brief to this Court, the petitioner makes no serious effort to overcome or contradict its factual predicate. Indeed, he can not. Nor is there any basis in the record for this Court to come to a contrary conclusion. In these circumstances, the very narrow holding below presents no constitutional question of sufficient substance to warrant review. The broad question which petitioner seeks to pose is, quite simply, not presented where the court below has, for all practical purposes, granted access of a grand jury witness to his lawyer in any case where the barest claim of legitimate need can possibly be sustained. Surely, this tribunal need not concern itself with tactical ploys (fairly determined below to be such) masquerading as the assertions of constitutional rights.

Conclusion

The petition for certiorari should be denied or dismissed.

Respectfully submitted,

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June, 1968